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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/803,121

03/17/2004

Morton Beroza

0082.04

5292

25295 7590 10/26/2009  
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EXAMINER

PARSLEY, DAVID J

ART UNIT

PAPER NUMBER

3643

MAIL DATE

DELIVERY MODE

10/26/2009

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MORTON BEROZA

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Appeal 2008-001537  
Application 10/803,121  
Technology Center 3600

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Decided: October 26, 2009

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Before LINDA E. HORNER, JOHN C. KERINS, and  
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL

Morton Beroza (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claims 18-23. Appellant canceled claims 1-17. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

The claimed invention is to a device that permits uniform, extended emission of a volatile liquid attractant for a targeted flying insect. Spec. 1, ¶ 0003.

Claim 21, reproduced below, is illustrative of the subject matter on appeal.

21. A trap for flying insects comprising:

(a) an open ended trap that allows air passage through said trap comprising a device consisting of a container having a top surface, a bottom surface, and side walls, having a composition of at least one volatile liquid attractant specific for one targeted flying insect species, and a first opening in the top of said container to frictionally receive a wick;

(b) an adjustable wick frictionally inserted into said first opening of said container wherein the length of said wick is frictionally adjustable to provide a uniform emission rate of said at least one attractant which results in maximum attraction of said flying insect over an extended period, and

(c) a second opening in the top of said container, smaller than said first opening and large enough to prevent film closure by a liquid,

wherein said second opening maintains air pressure in said container and wherein said container emits said at least one volatile attractant for at least about six months without replenishment of said attractant.

The following Examiner's rejections under 35 U.S.C. § 103(a) are before us for review<sup>1</sup>:

Claims 18 and 21 based on Grimes (US 1,056,535, issued Mar. 18, 1913) in view of Baker (US 6,543,181 B1, issued Apr. 8, 2003) or Huang (US 6,585,990 B1, issued Jul. 1, 2003);

Claims 19 and 22 based on Grimes and Huang;

Claims 18, 19, and 21-23 based on Kubalek (US 2,254,948, issued Sept. 2, 1941) in view of Baker or Huang; and

Claim 20 based on Grimes in view of Baker or Huang further in view of Hurwitt (US 2,176,345, issued Oct. 17, 1939).

The Examiner found that Grimes discloses an adjustable wick as claimed because the wick is separate from the container and thus is movable up and down inside the container. Ans. 3 and 7. Appellant contends that the wick in Grimes is not adjustable, *see e.g.*, App. Br. 14.

The Examiner found that Kubalek's mixture of the poison and sugar or molasses attractant will last for at least six months, *see* Ans. 9, because Kubalek discloses that "the poison will last practically indefinitely," Kubalek, p. 1, col. 2, ll. 34-35. The Appellant contends that the combination of Kubalek with the attractant of Baker would last about two weeks as taught by Baker, *see e.g.*, App. Br. 47. The Appellant contends that the combination of Kubalek with Huang would yield results, after 24 hours, that

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<sup>1</sup> Certain grounds of rejection under § 103 for claim 23 present in the final rejection are not present in the Answer. Grounds of rejection not specifically withdrawn by the Examiner and not set forth in the Answer are usually treated by the Board as having been dropped. *See* MPEP § 1207.02. We consider these rejections withdrawn by the Examiner and we elect not to consider any grounds of rejection not present in the Answer. *Id.*

are only as effective as the commercial standard, whereas the Specification's examples of the claimed invention are more effective than the commercial standard, *see e.g.*, App. Br. 56. Accordingly, to the Appellant, the combination of Kubalek with Baker or Huang fails to disclose an attractant being emitted from a container for at least about six months without replenishment.

The first issue in this appeal is whether the scope and content of Grimes discloses an adjustable wick.

The second issue in this appeal is whether the scope and content of the combination of Kubalek with Baker or Huang suggests an attractant lasting about six months.

Grimes discloses a wick 16. The wick 16 draws water 11 within a container 10 in a capillary manner up to a fabric pad 17 containing a dry poison that is placed on top of a pedestal 14. Grimes does not disclose adjusting the wick in any manner. The pad 17 being frictionally secured to the top by guard 18 prohibits any movement of the wick upward. Further, if the wick 16 were moved downward, then the wick would not contact the pad and defeat the purpose of the wick which is to draw the water into the dry poison to make a solution. Therefore, the Grimes wick is not adjustable and thus does not satisfy the claimed wick.

Kubalek discloses a poison that "will last practically indefinitely." Kubalek, p. 1, col. 2, ll. 34-35. Kubalek fails disclosing, teaching, or suggesting that its sugar or molasses attractant would last practically indefinitely much less last for at least about six months. Baker and Huang do not teach or suggest their respective attractants lasting at least six months. Therefore, while the prior art suggests a poison lasting about six months, *see*

Kubalek, the prior art of record fails to teach, nor has the Examiner cogently explained, an attractant lasting about six months in the manner claimed.

Furthermore, to the extent that the Kubalek patent's disclosure of a "poison [that will] last indefinitely" would be regarded by persons skilled in the art as including the sugar or molasses attractant, Kubalek still fails to disclose or suggest an liquid volatile attractant that lasts for at least about six months without replenishment. The poison is said to last indefinitely, but will only operate as intended "indefinitely" with the replenishment of water. (Kubalek, p. 1, col. 2, ll. 35-37). Moreover, the Examiner has not pointed to any evidence that persons of ordinary skill in this are would understand that the term "indefinitely" would necessarily include a time period as lengthy as "up to about six months".

In view of the foregoing, Appellant's contention that the wick disclosed in Grimes is not adjustable in the manner claimed shows error in the Examiner's findings directed to the scope and content of Grimes. Further, Appellant's contention that Kubalek with Baker or Huang fails to suggest an attractant lasting at least six months in the manner claimed shows error in the Examiner's findings directed to the scope and content of Kubalek with Baker or Huang. The Examiner does not utilize the other prior art of record to cure the deficiencies raised by Appellant's contentions. Accordingly, the decision of the Examiner to reject the claims is reversed.

REVERSED

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